IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CHARLES NELSON CO.,
Appellant,

vs.

THE STANDARD THEATRE CO.,
Appellee.

No. 1367.

BRIEF OF APPELLEE

Wm. H. BRINKER,
Proctor for Libelant and Appellee.

SEATTLE, WASH.

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BRIEF OF APPELLEE

To the Honorable, the Judges of the United States Circuit Court of Appeals, for the Ninth Circuit.

The appellant having failed to serve upon the appellee its brief on this appeal, the appellee, hereinafter called the libelant, finds it somewhat difficult to determine what course to pursue. It could ask to have the appeal dismissed and proceed to enforce the decree of the District Court, but it feels that it did not recover, in that Court, all that it was entitled to under the evidence, and as the case is here for trial de novo, and as this Court will consider all of the evidence and render such decree as the District Court should have rendered

The San Rafael, 141 Fed. Rep. 270,

it prefers to submit the whole case to this Court for trial anew.

STATEMENT OF THE CASE.

The libelant shipped upon the steamship "Santa Ana," from Seattle, Washington, to Nome, in Alaska, on a voyage which began May 26th, 1900, a large and valuable cargo, consisting of lumber, furniture, bedding, groceries, wines, liquors, cigars, tents, dry goods, blank books, blanks, printed matter, various kinds of gambling appliances, stage scenery, stage fixtures, stage wardrobes, etc., all for the purpose of establishing and operating, at Nome, Alaska, a theater, and a store and a saloon for the sale of wines, liquors, cigars and gambling appliances.

This cargo belonged to the libelant and was properly and carefully packed, boxed and crated, and shipped upon the "Santa Ana," and stowed below deck in the hold of that vessel in a careful manner.

There was a large amount of other cargo upon that vessel on that voyage, shipped by other persons, than the libelant, the exact amount or value of which does not clearly appear from the evidence. There is some evidence to the effect that libelant's cargo constituted about one-third of the value of the entire cargo, and that the entire cargo was worth more than $100,000, but this evidence is in the nature of an estimate, and may not properly rise to the dignity of proof, although claimant's witness, W. D. Wood, estimates libelant's goods at about one-tenth of the entire cargo. The manifest is in evidence, showing the amount, but not the value of the whole cargo. There is, however, no satisfactory evidence of the value of the entire cargo, other than that belonging to libelant.

The ship was worth from $90,000 to $110,000.

The vessel sailed from Seattle on her voyage on May 26th, 1900, and proceeded to sea, and, when about 700 miles off Cape Flattery on June 2nd, 1900, fire was discovered in the forward hold among the cargo. Efforts were made by the master and crew of the ship to extinguish the fire by pouring water into the hold. This was kept up for some time, but without success. Finally, the master caused the hatches to be battened down tight and then poured live steam into the hold at a pressure of 200 to 240 pounds, for more than fourteen hours. Some of the witnesses say for a much longer time. This proved successful and the fire was mothered by the steam. On June 4th, 1900, the hatches were opened and the hold entered and the seat of the fire examined, and some of the cargo found to be scorched and burned was taken out and thrown overboard. But the extent of the damage was not then ascertained. The vessel then proceeded to Dutch Harbor, and, after a few days, to Nome, where she arrived late in June, 1900. There the quarantine officers, having discovered smallpox aboard, sent her to quarantine at Egg Island, without permitting her to discharge either passengers or cargo. She remained at quarantine about two weeks and then returned to Nome about July 1st to 3rd, 1900, when her cargo and passengers were discharged on the beach.

The steamship did not have sufficient room to properly accommodate all of the cargo in its warehouse on shore, so, by an arrangement made between Mr. W. D. Wood, as the representative of the ship, and certain members of the libelant company, the cargo of libelant was removed to a large tent warehouse belonging to libelant, in Nome, further up town from the beach. It was agreed by the representative of the ship and of libelant

that by such removal neither the ship nor the libelant would lose or waive any rights. The remaining cargo, except a small lot which the consignees abandoned to the ship, was delivered to the several consignees without taking or demanding, in any case, any bonds, security or agreement to contribute in general average, or otherwise, to any loss caused by fire, or by the sacrifice made to extinguish the fire and save the ship and cargo, although there was an attempt, at first, made by the representative of the ship to collect a uniform amount of ten per cent from each consignee; but this was afterwards abandoned, and such sums as had been collected were returned. There was, however, no demand ever made upon the libelant for this ten per cent, nor anything ever said to any one connected with libelant about giving security for any damages that may have occurred on the voyage, for it seemed to be admitted that libelant's cargo had suffered such great damage as to require payment to it rather than contribution by it.

After the libelant's cargo had been removed to its warehouse, a survey was made of it by one W. W. Gollin, who claimed to be a surveyor for the Board of Marine Underwriters of San Francisco.

This surveyor was employed by the ship, and, according to the testimony of himself and of W. D. Wood, represented the ship in making the survey. But the testimony of several witnesses for libelant is, that Gollin claimed to be representing the insurance companies in which libelant's cargo was insured, and those witnesses understood from Gollin's statements that he was endeavoring only to ascertain the extent of the fire loss, or damage done by the fire, for the benefit of the in-

surance companies, and refused to examine any cargo to ascertain the extent of its damage, which did not show burns or scorchings. At all events, it is clear from the great weight of the testimony that the survey made by Gollin was very cursory, superficial and incomplete, and hastily made, without any careful examination, although the representative of libelant insisted that it be more thorough, and constantly objected to the manner in which it was made.

The estimate of the amount of the damage made by Gollin, as shown by his report, when considered in the light of all the testimoney, proves that his alleged examination was perfunctory and his estimate worthless for any purpose. Although while Gollin, in his deposition, uses the words "survey," "appraisement" and "adjustment," it is clear that the most, and the only thing he did, was to examine a part of the cargo belonging to libelant and "survey" or "appraise" the damage it had sustained. There was no pretense of an "adjustment" of the damage in the sense of a settlement of the final amount due to or from libelant to or from the ship, or any other interest concerned, for the evidence shows that Gollin took into consideration, in his so-called "adjustment" nothing but the cargo of libelant, and only so much of that as showed the marks of the fire. He did not consider the amount or the value of the remaining cargo, which he could have done, for the means of information were then accessible to him, nor the amount of damage such cargo sustained, if any, nor the value of the ship, nor the amount of damage it sustained, if any, nor the amount or value of the pending freight.

Libelant's cargo having been delivered to it, and having been surveyed by Gollin, and the libelant being

dissatisfied with the survey and objected thereto, and believing that its cargo had sustained greater damage, especially from the water and steam in the efforts made to put out the fire, than that found by Gollin, immediately caused a further and more careful and thorough examination of its cargo to be made for the purpose of ascertaining the extent of the damage it had suffered, not, however, for the purpose of any general average adjustment, but for the purpose of making its proof of loss to the insurance companies under whose policies its cargo was insured. Believing that it had only ordinary fire insurance (not having the policies, but only a certificate covering the risk, with a promise that the policies would be issued later, which was done), and not being informed of the kind of policy it was entitled to, nor its terms or conditions, assumed that it was an ordinary fire policy and that it would be required to make its proofs of loss within a limited time (which it assumed to be sixty days from the date of the fire), made up its proofs of loss and forwarded them to the agent of the insurance companies within sixty days from the time the fire occurred.

None of the officers of libelant, nor any person connected with libelant, knew, or ever heard anything of "general average," "general average loss," or "general average adjustment," while in Nome, nor until long after their return to Seattle and until after the matter had been referred to an adjuster in San Francisco for adjustment. This is the testimony of all the witnesses for libelant, and it is contradicted by none. Mr. Wood only says that he "is satisfied" that he mentioned it to Mr. Malloy, but could not state it as a fact, but only his

conclusion, or opinion, that he did. This statement Mr. Malloy denies:

After the ship returned from Nome she went to San Francisco, and there the claimant, The Charles Nelson Company, selected Mr. W. C. Gibbs, an adjuster of marine losses, to make an adjustment, in general average, of the loss caused by the sacrifice on this voyage. (See depositions of W. H. La Boyteaux, Record pp. 89, 104, 127, 131 and exhibits thereto; and M. C. Harrison, Record pp. 139, 142 and exhibits thereto.)

After the matter had been thus placed in the hands of Mr. Gibbs for adjustment, the insurance companies, to which libelant had made its proofs of loss, laid those proofs before the adjuster, and the claimant also submitted proofs, and the adjuster called on libelant for additional data, and these were furnished. He also called on W. D. Wood and the claimant who furnished additional information.

Before the adjustment was completed, Mr. Gibbs died, and the adjustment was then undertaken and concluded by Johnson & Higgins, through La Boyteaux and Lowe, and certificates of the result furnished to claimant and to libelant.

Libelant immediately demanded payment from claimant of the amount found due to it from the ship and freight, this, after long and vexatious delays, was finally refused, and this libel filed.

The value of the vessel was from $90,000.00 to $110,000.00

The value of the pending freight was, according to Wood, $3,427.72, although libelant paid nearly $6,000.00 freight on its cargo. The value of the cargo belonging

to libelant, if it had arrived at its destination in good order, was, on the basis of 100 per cent. increase over cost, with freight prepaid and similarly increased $77,-684.30.

There is no satisfactory evidence of the value of the entire cargo.

In the absence of testimony of the value of the entire cargo, the adjustment, to be made in this cause, will, necessarily, be confined to the value of the ship, the freight and the cargo of libelant, and the losses sustained by each in the sacrifice.

Of the cargo saved by libelant, the evidence shows there was sold at Nome all that was of any value and that $21,000.00, gross, was realized, and that the expenses and commissions expended in making the sales amounted to $6,000.00 (Rec., p. 579), leaving as realized from the entire cargo owned by libelant but $15,000.00, net. There was a small amount of that cargo left at Nome, but nothing was ever realized from it, so that may be considered as worthless.

In estimating the value of libelant's cargo, or rather, its cost to libelant in Seattle, the exhibits and proofs show various items for freight paid from the points at which the goods were purchased to Seattle, and for drayage to the wharf, and labor expenses upon the goods prior to shipment, all of which libelant claims entered into and formed a part of the cost of the goods to it, and properly form a part of the value of the cargo.

The freight prepaid by libelant, including wharfage at Seattle of $89.00, was $6,073.47. (See Bill of Lading, one of original exhibits, sent up under stipulation. Rec., p. 886.)

The evidence shows that the cargo was so injured that it was unsalable, and had to be peddled out in order to be sold at any price.

The evidence further shows that because of the damage suffered by its cargo libelant was unable to establish or carry on the business for which the goods were shipped to Nome, and that its business, or rather, its intended business, was broken up and destroyed and had to be abandoned, and the portion of the cargo which reached its destination was so injured that it was practically worthless, except as damaged goods, and could only be sold as damaged goods, far below the market, and for such prices as could be gotten for them as damaged or second hand goods and by hawking them about.

When the matter was in the hands of the adjuster in San Francisco, libelant sent to the adjuster all of the original invoices for the cargo, and when, after that adjustment was completed, it endeavored to have its invoices returned to it, it was informed that many of them had been lost, or destroyed, or mislaid, and could not be found, so libelant then attempted to obtain duplicates of the missing invoices, and was successful in most instances, but in others it was compelled to have Mr. Malloy, who is its secretary, and who was a member of the copartnership which owned the Standard Club in Seattle, make out new invoices in lieu of those from that club which had been sent to San Francisco and were not returned, and in other instances it obtained duplicate invoices from Lane and from Peterson, from whom some of the articles in the cargo had been obtained. To many of these new invoices claimant objected when they were offered in evidence, but libelant insisted, and still insists that they were all admissible.

The bill of lading is in evidence and provides that any adjustment in general average shall be made in accordance with the York-Antwerp Rules of 1890. These Rules are in evidence. (Rec., p. 752.)

The original libel was based upon the general average adjustment made in San Francisco by the adjuster selected by the claimant.

During the progress of the cause the District Court held, in passing upon exceptions to the answers of claimant, that the San Francisco adjustment was not binding upon claimant because it did not appear that claimant had agreed in advance to be bound by it, nor had it accepted it after it was made. (Rec., pp. 54 and 83.)

Both libelant and claimant understood the Court's decision to practically lay that adjustment out of the case, and, with that understanding, on its part at least, the libelant filed amendments to its libel (Rec., p. 86), stating further facts, and praying the Court, if said adjustment should be ignored, to hear all of the evidence and make proper and fair adjustment in general average, itself, of the losses sustained by the sacrifice on that voyage.

The claimant answered the libel and amendments and the cause was referred to the commissioner to take and report the proofs to the Court. This was done at great expense to libelant, because, with its understanding of the Court's decision, it became necessary for it to go over the entire ground covered by the San Francisco adjuster, and more, an dit introduced evidence of everything done from the inception of the design to ship the cargo to Nome down to the final disposition of the remnants of the cargo and the adjustment in San Francisco,

and in fact, almost to the time of the trial in the District Court.

ARGUMENT.

I.

The District Court having held that the San Francisco adjustment was not binding upon the claimant, it is, of course, not binding upon the libelant, and with that understanding of the Court's decision, libelant accepted the decision as the law of the case, and conformed to it accordingly, and at great expense of time, labor and money, has taken the testimony of all witnesses it could find who had any knowledge of the subject in controversy for the purpose of presenting all of the facts to the Court, so far as they could be obtained, so that the Court, upon full consideration, could make a proper adjustment of the loss, and by its decree provide the amount and manner of its payment.

II.

In order to properly adjust the loss and fix and assess the amount to be contributed by each interest in the enterprise, the evidence should show the value of the ship, the amount of the pending freight, the value of the entire cargo at the port of destination, and the amount of the loss.

The Rapid Transit, 52 Fed. Rep., 320.

The evidence supplies all of these necessary items of an adjustment, except the value of the entire cargo.

The vessel, according to the testimony of Capt. R. C. Chilcott, was worth $100,000.00 (Rec. p. 543), and by the testimony of Capt. James Carroll, the same amount

(Rec. p. 542), and by the answer of the claimant in the case of Haldron vs. The S. S. Santa Ana, numbered 1889 and 1895, of the docket of the District Court, to be $110,000.00, and by the decree of that Court in those cases to be $90,000.00. (See original exhibits, sent up as per stipulation. Rec. p. 886.)

So, the vessel was worth anywhere from $90,000.00 to $110,000.00. At all events, it was worth $90,000.00.

The cargo of libelant is shown by the evidence of several witnesses to have been worth, at the port of destination, if it had arrived there sound and uninjured, more than 100 per cent. above its value at Seattle, the port of departure.

The witness Urquhart, as to the items of the cargo concerning the value of which he testified, places the value at Nome at from 80 to 100 per cent. above Seattle prices. (Rec. p. 224.)

The witness Little places it at the same. (Rec. pp. 232-4.)

The witness Richards places it at 80 to 90 per cent. (Rec. pp. 243-4), and gambling appliances at 200 per cent. (Rec. p. 244) above Seattle prices, making an average of 140 per cent above.

The witness Nestor places it at from 50 to 500 per cent. above Seattle prices, making an average of 237.5 per cent. above. (Rec. pp. 249 et sep.)

The witness Dawson places it at from 50 to 450 per cent. above (Rec. pp. 272 et seq.), making an average of 143 per cent. above Seattle prices.

The witness Lane places it at from 100 to 800 per cent. and more (Rec. pp. 304 et seq.), making an average

of 339 per cent. above Seattle prices.

The witness Pope, who was the manager of the Alaska Commercial Company, at Nome, and had, perhaps, a better opportunity to know the prices and values there than most other witnesses, places it at from 100 to 500 per cent. (Rec. pp. 377 et seq.), making an average of 197 per cent. above Seattle prices.

The witness Valentine, who was the manager of J. M. E. Atkinsson & Co., otherwise known as The Nome Trading Co., at Nome, places it at from 75 to 300 per cent. (Rec. pp. 407 et seq.), making an average of 177.6 per cent. above Seattle prices.

The witness Campion, who was the manager of The Seattle Brewing & Malting Co., at Nome, places it at from 100 to 800 per cent. (Rec. pp. 547 et seq.), making an average of 180 per cent. above Seattle prices. This witness based his estimate upon actual sales of the same kind or similar goods, made by him during the time covered by the inquiry.

It is true none of these witnesses pretended to give the Nome value of *every* item of libelant's cargo, but only upon such items as fell within their knowledge, and these values were given of goods arriving in good order; but taking the testimony of all the witnesses together, they, in great measure supplement each other, and from all the testimony a fair and reasonable idea can be obtained of the market value at Nome of all of the cargo, for the values given in evidence are sufficiently general to cover goods of any and every description, for if it is shown that such staple articles as the witnesses testify to as being largely above the values in the States, or at Seattle, had the value at Nome placed upon them by

these witnesses, and there is nothing to contradict their testimony, or in any way discredit it, it is a just conclusion from all the evidence that values at Nome, in all lines, ranged relatively higher than at Seattle or elsewhere in the States.

The average of all the Nome values, as testified to by these witnesses, is 181.6 per cent. above Seattle, or outside values, and this shows the general and uniform increase at Nome over prices in the States for goods of the kind embraced in this cargo.

But libelant, for the purposes of this case, instead of taking 181.6 per cent. above outside prices as the value of its cargo at Nome, if it had arrived sound and in good order, will take a uniform rate of 100 per cent. above cost at Seattle, as giving a fair, reasonable and conservative value of the entire cargo at Nome, the port of destination.

This gives the value of libelant's cargo, at Nome, if it had arrived sound, as $65,538.30, besides freight paid.

Notwithstanding this testimony, which was wholly uncontradicted, the District Court seemed to have passed it all by, and rendered judgment based entirely upon the San Francisco adjustment, saying "The libelant argues for a larger award than obtained by the adjustment, but it does not by its pleadings repudiate the adjustment, and should be content to have a decree for the amount sued for, with interest." (Rec. p. 867.)

It is true the adjustment was not assailed by libelant, but it was by the claimant, and claimant's objections to it were sustained by the Court in its opinion upon exceptions above cited (Rec. pp. 54-5), when it held that the adjustment was not binding upon claimant, unless it had previously agreed to be bound, or had subsequently ac-

cepted it. Certainly if not binding on one party, it was not binding upon the other.

The Court evidently believed that the adjustment had been assailed at some stage of the case by some party to the record, for it proceeds to look into the adjustment and point out some of the mistakes in it and to show where it did not do justice to libelant. (Rec. p. 866.)

Yet it finds the adjustment to have been "fairly and honestly and approximately accurate and just and not unfair to the owners of the ship." (Rec. p. 866.)

But libelant insists that this is not a just conclusion and is not founded on the evidence taken and submitted to the Court, under the influence, and by the authority of, its previous opinion setting the adjustment aside (Rec. pp. 54-5), but that libelant, being compelled to abide by the decision of the Court, was bound to adjust its conduct to that opinion, and amend its libel, and go into proofs at large, and seek a new adjustment by the Court, as it did, without regard to the San Francisco adjustment, and in such circumstances it works a hardship upon the libelant to say that at one time the adjustment is not binding and at another time that it is, and that libelant ought to be satisfied with the amount found to be due by it.

It is not a question of what the libelant "should be content to have," but what under the law and *evidence* it is entitled to.

The Court says libelant did "not by its pleadings repudiate the adjustment," and this seems to be the main reason for its judgment; but libelant submits that in view of the Court's previous ruling, that the adjustment was not binding, and in view of the overwhelming mass

of evidence proving that the adjustment was wrong and unfair to libelant, it was the duty of the Court to consider all of the evidence, ignoring any mere omission in the pleadings and decide the case upon the evidence. In this state of the case, libelant was not required by its pleadings to repudiate the adjustment, for,

"There is no doctrine of mere technical variance in the admiralty * * * * * * * * * * it is the duty of the Court to extract the real case from the whole record and decide accordingly."

"*The Syracuse*," 12 Wall., 167.

"*The Gazelle and Cargo*," 128 U. S., 474.

The whole conduct of the case after the Court's decision that the adjustment was not binding (Rec. pp. 54-5), and the course pursued by both parties, show that the cause was treated as one for an original adjustment by the Court, and, if it was necessary to enable the Court to "extract the real case from the whole record and decide accordingly," to amend the pleadings and set aside the San Francisco adjustment, that will be regarded as having been done, because the case proceeded as if it had been done, and without objection from either party.

To say in the final decision, "the adjustment is binding because the libelant did not assail it in its pleadings," in the light of the previous ruling (Rec. p. 54-5), works a hardship on libelant which ought not to be done, for if libelant had believed, or could have had any reason to believe, that the Court would finally hold the adjustment good, it could have introduced the adjustment in evidence under its original libel and rested secure until claimant impeached it for fraud, accident or mistake, and thus have saved an immense amount of time, labor

and expense; but libelant having, in good faith, obeyed the ruling of the Court and having proved damages largely in excess of the amount found by the adjuster, without objection from Court or opponent, is now certainly entitled to the benefit of whatever the evidence shows its damages to be.

III.

The rule is that general average must be adjudged upon the value of the cargo at the port of destination.

Dixon on Gen. Av. (Ed. of 1867), pp. 171-2.

The Eliza Lines, 102 Fed. Rep., 184.

York-Antwerp Rules of 1890, Rule 17.

14 *Am. & Eng. Encyc. of Law* (2nd Ed.), pp. 989-991.

Bradley vs. Cargo of Lumber, 29 Fed Rep., 648.

Olivari vs. Thames & Mersey Ins. Co., 37 Fed. Rep., 894.

Nat. B'd of Mar. Underwriters vs. Melchers, 45 Fed Rep., 643.

The bill of lading (which is in evidence as libelant's Ex. 1), in the sixth paragraph, expressly provides that general average, if any, shall be adjusted according to the York-Antwerp Rules of 1890, and the 17th of those rules, cited above, provides: "The contribution to a general average shall be made upon the actual value of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed," etc. (Rec. p. 761.)

And Rule 16th provides: "The amount to be made good as general average for damage or loss of goods sac-

rificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure." (Rec. pp. 760-1.)

With this rule in mind, the libelant sought by the testimony to show "the market values at the date of the arrival of the vessel and the termination of the adventure, and believes it has done so, so far as it was possible, by human testimony.

IV.

The ship, freight and cargo must all contribute in general average to make good the loss sustained by the sacrifice.

14 Am. & Eng. Encyc. of Law, 2nd Ed., 986.

8 Am. & Eng. Encyc. of Law, 1st Ed., 1305.

This rule is clearly stated in:

Ralli vs. Troop, 157 U. S., 386, L. Ed. 39:742,

And approved in:

The J. P. Donaldson, 167 U. S., 599; L. Ed. 42:292,

And also in:

The Irrawaddy, 171 U. S., 187; L. Ed. 43:130.

V.

The ship and freight suffered no damage whatever, and must, therefore, contribute upon their full value. "Freight pending" includes prepaid freight and passage money.

"*The Main,*" 152 U. S., 122; Law Ed. 38:381.

VI.

The value of the saved portion of libelant's cargo, which reached its destination in a damaged condition, can only be certainly ascertained by a knowledge of what such goods in their damaged state would sell for in that market.

14 Am. & Eng. Encyc. of Law, 2nd Ed., p. 992.

Bell vs. Smith, 2 Johns, 98.

1 Parsons on Shipping, 461.

The witnesses all agree that they were unsalable, except as damaged, or second hand, goods, and the evidence fails to show what the sale value of such goods was, except as it may be ascertained from the evidence of the actual sales made of this particular cargo, or portions of it.

1 Parsons on Shipping, 461.

The evidence is that the cargo was so damaged that it was unsalable and had to be hawked about, and persons induced by commissions to aid in working it off, and that the gross amount realized from its sale, after the most diligent effort, was only $21,000.00. (Rec. p. 579.)

And the cost and expenses of making the sales was $6,000.00. (Rec. p. 579.)

So that, out of the entire cargo libelant only realized $15,000.00, net.

Then, the amount of the cargo to be contributed for is the difference between the sound value at the port of destination, if it had arrived uninjured, and the actual value of the saved portion in its damaged condition at that port.

14 Am. & Eng. Encyc. of Law, 2nd Ed., 991.

Carver on Carriage by Sea, Sec. 419.

York-Antwerp Rules of 1890, Rule 16.

The cargo cost at Seattle, including the items of draying, labor, storage, etc., as shown by the evidence, $32,769.15; freight prepaid to be added, $6,073.47. The Nome value, at a unform increase of 100 per cent, which, as we have shown, the evidence abundantly justifies, with prepaid freight similarly increased, was $77,684.30.

Taking this as the value at the port of destination, and deducting the amount realized from the sales less the cost and expenses of making the sales, and the damage is $62,684.30.

Taking the cargo at $77,684.30, the ship at $100,000, and the pending freight at $3,427.72, makes a total value upon which to estimate the contributory share of $181,-112.02, and the rate per cent. is 34.6107. At this rate the cargo should contribute $26,887.08, and the ship and freight should pay $35,797.22.

But if the estimates made by the several witnesses are to control, the damage will be the amount of those estimates, or of the average of all of them.

VII.

For the purpose of general average, the ship is bound to the cargo, and the cargo to the ship, and the sacrifice must be made good in proportion to the value of each interest at risk.

Schr. Freeman vs. Buckingham, 18 How., 182, Law Ed. 15:341.

Dupont vs. Vance, 19 How., 169, L. Ed. 15:586.

Ralli vs. Troop, 157 U. S., 386, L. Ed. 39:742.

VIII.

The destruction or injury of the cargo by water or steam poured into the vessel to extinguish the fire is a sacrifice which must be made good in general average.

The Roanoke, 59 Fed. Rep., 161.

The Rapid Transit, 52 Fed. Rep., 320.

Heye vs. North German Lloyd, 33 Fed. Rep., 60.

The Roanoke, 46 Fed. Rep., 297.

Nelson vs. Belmont, 5 Duer, 310.

Nimick vs. Holmes, 25 Pa., 366.

14 Am. & Eng. Encyc. of Law, 2nd Ed., 973.

York-Antwerp Rules of 1890, Rule 3.

IX.

The only disputed question of fact in the case is, whether the libelant agreed that the survey or appraisement made by Gollin was correct, and showed the total amount of damage the cargo had sustained. The District Court held that the attempt to plead that survey, or so-called adjustment, was not a good plea, and no defense to the libel. (Rec. p. 60.) That the most that could be claimed for that survey and the alleged assent thereto by libelant, would be that it was an admission by libelant that that survey correctly stated the amount of damage the cargo had sustained. That it was not an estoppel, and could only be evidence of an admission. (Rec. pp. 60-1.)

Gollin alone testifies to such agreement. W. D. Wood says he knows nothing of any such agreement, but supposed the examination which he employed Gollin to make had been satisfactory, because he had heard no

complaint of it; but does not testify that if it was unsatisfactory complaint should be made to him.

The testimony of Gollin is contradicted by the testimony of Malloy, of Peterson, of Lane, and of Gordon, who were all present at some time during the progress of Gollin's survey, and they all agree that there was no agreement made between Gollin and Malloy, except as to a few items which were totally destroyed, and which Gollin stated were worthless, and to this statement Malloy agreed. But that is the only agreement made. Those who were present during the survey testify that Malloy objected all the time to the estimate of damage Gollin was placing upon the goods he examined.

They all agree that Gollin only examined a part of the cargo, and refused to examine the rest. Gollin tries to account for his partial examination by saying that he only examined such goods as were laid out for him, and that as to the others, Malloy agreed to waive the damage to them. This is contradicted by Malloy and by the other witnesses who were present. Gollin's examination is shown to be very cursory, superficial and hastily made. He would only work a short time each day at it, and finally, to induce him to hurry it up and finish it properly and within a reasonable time, Malloy gave him $100.00. Gollin says that he understood this $100.00 to be a bribe, but it will be observed that he kept it, although he tried to pretend that it was "tainted money."

Gollin gave Malloy and the other witnesses to understand that he was examining for the insurance companies, and, believing that to be true, and being dissatisfied with the very partial and incomplete examination made by

Gollin, Malloy immediately made another and more careful and thorough examination, and on this last examination he based his proofs of loss to the insurance companies.

Gollin's statement is further shown to be improbable, and, therefore untrue, by the fact that this cargo, which was worth more than $50,000.00, if it had reached its destination uninjured, and upon which more than $5,900.00 freight had been paid, and which had been shipped to Nome for the purpose of establishing and carrying on a large and extensive business, was so far damaged and ruined as to be wholly unsalable, except as damaged goods, or "old junk," as some of the witnesses call it, and which, after diligent effort, sold for only $21,000.00, gross, and because of such damage libelant was compelled to and did give up and abandon its business; yet Gollin says, in the face of all this, that Malloy agreed that his estimate of $3,617.04 was all the damage that cargo had sustained.

And appellant attempted to make the District Court believe, upon the unsupported testimony of Gollin, that libelant admitted this enormously valuable cargo, almost totally ruined, damaged beyond any hope of repair, was injured only to the extent of $3,617.04, and that, too, without any promise, or agreement, or assurance, that even that beggardly sum would be paid by any one, at any time. The testimony of Gollin carries upon its face its own refutation by its inherent improbability, and it is contradicted by all the other evidence in the case and by the physical facts surrounding the case.

We insist that in the light of all the testimony Gollin's testimony is not sufficient to amount to an admission

on the part of libelant as to the extent of the damage.

But if the Court should believe that Gollin's testimony is sufficient evidence of an admission by libelant that it was only damaged in the amount estimated by him, then the evidence all shows that such admission was made under a mistake of fact and in ignorance of the truth as to the extent of the damage the cargo had sustained, and is, therefore, not binding upon libelant, but is open to explanation and to be utterly disproved, as it has been by the great mass of the testimony, and as shown by the truth, as afterwards ascertained upon a more thorough and careful examination of the cargo and by the sales actually made.

X.

Appellant, seizing upon a remark in the opinion of the District Court in passing upon the exceptions to the answer, has endeavored, in the cross-examination of libelant's witnesses to show that certain gambling appliances, forming a part of libelant's cargo, could only be used for gambling purposes, and argued that for that reason they should not be contributed for in general average.

This argument, we respectfully submit, is not sound. The test as to whether goods shall be contributed for in general average does not depend upon whether the goods could or could not be used for an unlawful purpose, at some other time, and not at the time of the sacrifice; but is determined solely by the decision of the question: Would such goods be compelled to pay, or contribute in general average, to make good the loss sustained by the other cargo and the ship, if such goods had been saved uninjured?

The only possible ground upon which it could be contended that these goods should not be contributed for is that they were contraband at the time of the sacrifice. But that they were not then contraband is shown by the simple definition of the word. The Century Dictionary defines contraband as follows: "Contra," "against," "ban," "the law or proclamation," and that it applies to (1) "illegal or prohibited traffic;" (2) "anything by law prohibited to be imported or exported," Cent. Dict., p. 1231. Now, under the facts of this case, it is impossible that these gambling appliances could have been contraband,, for the very sufficient reason that there was no law or proclamation making them contraband at the time of the sacrifice. Nor was there any law of Congress or of the State of Washington making the possession or ownership of gambling appliances unlawful; nor was there any proclamation from any authority declaring them to be such. Gambling appliances become unlawful by their unlawful use, or fall under the ban by their use for gambling. There is no pretense that any of those in this cargo were used for gambling at the time of the sacrifice, nor at any other time, so as to make them fall under the designation of contraband.

It is the *use*, not the existence or possession of gambling apparatus, that makes them contraband.

Gulf. C. & S. Ry. Co. vs. Johnson, 71 Tex., 619; 1 L. R. A., 730.

U. S. vs. Smith, 27 Fed. Cases, p. 1155.

14 Am. & Eng. Encyc. of Law, 2nd Ed., 683, par. 4.

1 Suth. on Dam., 3rd Ed., p. 14, and note.

In Johnson's case (71 Tex.) recovery was allowed for damages to gambling tools resulting from injury to

a building, and the Court holds that unless the law is being violated *at the time of injury,* the plaintiff is entitled to recover.

Neither gambling nor the possession of gambling tools was an offense at common law, unless gambling was carried on in such a public manner as to constitute a public nuisance.

14 *Am. & Eng. Encyc. of Law*, 2nd Ed., 666.

U. S. vs. Willis, 28 Fed. Caess, p. 698.

The "keeping," etc., of gambling tools must be for the purpose of obtaining bettors. (14 Am. & Eng. Encyc. of Law, 2nd Ed., 711 and notes.) This confirms our position, if any confirmation were needed, that it is the *use,* and not the ownership of gambling appliances which renders them obnoxious to the law, and only then when there is a statute so declaring.

Therefore, these appliances could not be held, as a matter of law, to be of no value, because unlawful, for we have shown that they were not unlawful in the situation in which they were placed at the time of their injury.

As a matter of fact, they are shown by the evidence to have been in great demand at their destination, and of immense value. (Rec. pp. 281-2 et seq., and pp. 233-4—312-13.)

These goods having been lawful at the time of the sacrifice, and having a lawful status of actual value, and being a part of the joint enterprise of that voyage, including in the enterprise the ship, freight and cargo, and being damaged by the sacrifice made to save the balance of the enterprise, must be contributed for the same as other lawful cargo.

XI.

Appellant has sought to meet the evidence of libelant only upon the amount of the damage to the barrel goods. To do this, it has shown by the witness Gottstein and by a table identified by him, the amount of the 'outage'' or ''wantage'' there would be in whiskies in barrels during certain periods by natural absorption and evaporation; and by the witness O'Reilly that he bought some of the whiskey from libelant at Nome which was in this cargo, and that the barrels were short in their contents. But O'Reilly testifies that the barrels which he bought were short a greater amount than the natural outage would allow, and that he made complaint to libelant of such shortage, and that libelant made it good to him by paying him money. (Rec. p. 858.)

The testimony of Gottstein and the table introduced by the appellant are no more than merely a statement of the terms of the statute which provides that spirits in bonded warehouses shall be guaged and stamped when put in bond, and reguaged and again stamped when they are taken out of bond and the taxes paid, and that upon such reguaging there may be allowed so much for absorption and evaporation within certain definite periods, and no more, and that the taxes shall be paid according to such reguage. (28 Stat. 564, Sec. 50; 30 Stat. 1349; 32 Stat. 770.

In short, it was to establish the maximum limit of evaporation which would be allowed as a basis of taxation.

This reguaging was to be made upon the request of the owner, if made within a certain time, and if no request was made and no reguage had, then the taxes were

required to be paid upon the contents of the barrels as shown by the first guage. 1d.

The testimony shows that the barreled goods in this cargo were reguaged, or double-stamped goods, and the exhibits show when they were released from bond and the number of gallons they then contained. The testimony of Mr. Messersmith shows that the natural outage from the time these barrels were taken out of bond, at the date of their purchase by libelant, as shown by the invoices, to the time of their landing at Nome would be so trifling as to be hardly appreciable, and that under no circumstances could such natural outage, during such time, amount to the shortage that was found in the barrels at Nome, as shown by all the evidence.

So, it seems clear that this outage, or shortage, as it was found to exist at Nome, of from 20 to 30 per cent. of the contents of the barrels, as shown by the guager's lists, was more than the natural outage, and that it was caused by the superheating by the steam to which the cargo was subjected in the efforts to extinguish the fire in the hold of the vessel, for it was proven that the barrels showed evidence of leakage from the bungs and where the liquor had escaped and run down the sides of the barrels. (Rec. pp. 458, 515, 580, 582, 660.)

The evidence also showed that the case goods, i. e., liquors in bottles enclosed in cases, had been so overheated as to cause them to escape from the bottles, sometimes through the corks, for the bottles were found sound with the corks in place, but the wine or liquor in some cases entirely gone and in others partly gone, and what was still in the bottles ruined, and in other instances the neck or bottom of the bottle was found

broken and the contents gone. (Rec. pp. 342, 586, 445, 501, 513-14.)

XII.

The master of the ship having failed to take general average bonds or other security for the contributory share, due from the remainder of the cargo, the ship becomes liable and must contribute for that cargo.

Crooks vs. Allan, 5 Q. B. Div. (1879), 38.

1 Parson's Mar. Law, 330.

Heye vs. North German Lloyd, 33 Fed. Rep., 60.

The Allianca, 64 Fed. Rep., 871.

XIII.

Libelant is entitled to recover interest on the amount of the contribution due from the ship.

The Wanata, 95 U. S., 600, L. Ed. 24:461.

The Southwark, 129 Fed. Rep., 171.

The Favorite, 12 Fed., Rep., 213.

The George W. Robey, 111 Fed., Rep., 601.

Especially since the appellant has litigated the right of the libelant for so many years, and with such stubborn persistency, when the right of the libelant to recover has been manifest from the very beginning, even as shown by appellant's main witness, Gollin, for, by his testimony it is shown that libelant was damaged, at least, to the extent of $3,617.04, and yet appellant has never paid nor offered to pay that amount, or any part of it.

It selected its own adjuster in San Francisco, and then refused to stand by what that adjuster did. Prior to that, at Nome, it selected its own surveyor, Gollin, and has refused and still refuses to pay the ridiculous

amount which he found to be due to libelant. Under these circumstances, the appellant does not stand in an enviable light before the Court in an equitable proceeding to adjust a sacrifice suffered by one for the good of all.

XIV.

As to the manner and basis of the adjustment, there may be several bases upon which it might be made under the evidence, but libelant claims that the only proper one is:

Value of ship	$100,000.00
Pending freight	3,427.72
Value of cargo	65,538.30
Freight prepaid by libelant..... Doubled	12,146.00
Total value at risk	$181,112.02
The net amount of sales	$ 15,000.00

The loss, the difference between the Nome value of cargo and freight, $77,684.30, and the net amount of sales, $15,000.00, making $62,684.30.

The rate per cent. upon which the contribution must be calculated is obtained by dividing the loss by the total value at risk, which gives the rate of 34.6107 per cent. Multiplying the value of the cargo on one hand, and the ship and freight on the other, by this rate, gives the contributory shares as follows:

Cargo	$ 26,887.08
Ship and freight	35,797.22
	$ 62,684.30 total

loss and the amount made good.

But if the value of the ship is only.$ 90,000.00
Pending freight ..... 3,427.72 and the prepaid freight should not be added to the value of the cargo, the calculation would be as follows:

Ship .....$	90,000.00
Freight	3,427.72
Cargo	65,538.30
Making the total value at risk..$	158,966.02

and if the loss is the value of the cargo, less the net amount of the sales, the loss will be $65,538.30, less $15,000.00, being $50,538.30. This loss divided by the total value will give 31.7950 per cent. as the rate upon which the contributory shares should be calculated; by this the cargo should pay $20,832.96, and the ship and freight should pay $29,705.34, making up the loss of $50,538.30.

Or, if this be not proper, then take the same values of ship, freight and cargo:

Ship .....$	90,000.00
Freight	3,427.72
Cargo	65,538.30
Total at risk .....$	158,966.02

and deducting the gross amount realized from the sales, from the value of the cargo, and taking the remainder as the loss, the loss will be $44,538.30; this divided by the total value, $158,966.02, will give 28.0170 per cent. as the rate upon which the contribution should be calculated, and will result as follows:

Cargo to pay .....$	18,362.76
Ship and freight to pay.....	26,175.54
Making the total .....$	44,538.30

the amount of the loss.

So, libelant contends that taking any view of the facts of this case, even the most unfavorable to it, and most favorable to the appellant, there must be a decree for the libelant for a sum in excess of $26,000.00.

But libelant says that it is entitled to have its damages estimated in accordance with the well settled rules governing the adjustment of losses in general average, and based upon a fair view of the evidence, and when so estimated it is entitled to recover under the first example above given, namely: $35,797.22.

XV.

As stated above, libelant not having been favored with appellant's brief on this appeal, it is in the dark as to what position appellant may take or what argument it may make here, beyond what may be gathered from the assignment of errors; so, libelant, in this dilemma, can only assume that appellant will pursue the same line of argument, if it makes an argument in this Court, that it pursued in the District Court.

Upon this assumption libelant will now attempt to answer that argument.

In the District Court appellant contended that the amount of the damages found by Gollin on his survey, made at Nome, should be taken as conclusive upon the parties to this action, and attempted to extract from the evidence an agreement on the part of libelant that that survey showed the true extent of the damage sustained by libelant's cargo by the sacrifice made to save the ship and cargo.

This contention is abundantly answered by the opinion of the District Court, in this case, in its ruling on

exceptions to the answer, to the effect that the alleged agreement, if made (which, however, the evidence shows was not made), was not conclusive, but was, at most, only an admission. (Rec. pp. 55-56-83.) That decision is well supported by authority. If such an agreement had been made, under the circumstances, it would be analogous to, and could amount to no more than, a demand by libelant for the amount of its damages, in a proof of loss, if made to an insurance company under its policy, and in such a case the law is: "The assured is not estopped from recovering a larger amount by the fact that his statement of demand, made after proof of loss, is less in amount than that to which he is entitled, but he may recover the larger amount, if a settlement is not made in pursuance of such statement."

4 Joyce on Ins., Sec. 3454, p. 3336.

American Ins. Co. vs. Griswold, 14 Wend., 399.

If there had been any such agreement, it would not be of any validity, for there was no consideration for it. It would be like the voluntary demand made on the insurance company, in the case last above cited. It was voluntary, without consideration, and, until accepted and performed by the owner of the ship, could be abandoned or rescinded by libelant. It was, as the District Court held, no more than an admission by libelant, even if Gollin's utterly improbable testimony should be believed in its entirety.

Appellant further contended that "libelant's goods were not released until after the goods had been inspected and the damages agreed upon." Now, there is not one particle of evidence to support this statement. It is evidently born out of the desire of appellant to es-

cape the effect of the ruling of the District Court, and to manufacture some semblance of a consideration to support the alleged agreement. Claimant must go outside the evidence to do this, for no witness testified that the goods were released after the survey by Gollin. Judge Wood does not so testify. He said he considered the goods constructively in his possession, although delivered to libelant without condition, except that no rights were waived, and that in his opinion they were in his possession until the damages were ascertained; but he does not say that libelant, or any one else in its behalf, so understood it, or accepted them on any such terms. The evidence is that the cargo was delivered *unconditionally*, except that no rights were waived thereby, which could exist consistent with such delivery, either of libelant, or the ship, or any one else. Neither party seemed to have a clear idea what their respective rights were, further than that libelant was entitled to the possession of its goods, but whatever their rights were, or should turn out to be, they were not waived.

Neither Judge Wood nor the ship had the right to refuse to deliver the goods to libelant until the damages should be ascertained or agreed upon; but libelant was entitled to their immediate possession unless the ship demanded a general average bond, or other security, to pay its contributory share of any assessment that might be made, but this was not demanded nor expected, for it was clear to all that libelant would have nothing to pay. The freight had been prepaid, and there was no claim to hold the goods on that account. The ship had not been injured by the sacrifice, but libelant's goods had been, and it was clear to every one that the payment would have to be made *to* libelant, and not *by* it.

Judge Wood seemed to have a vague idea that it was his duty to have the amount of the damage ascertained by a survey, and for that purpose he employed Gollin. And he may have thought that was the best way to lay the basis of a general average adjustment, and he may have said as much to Malloy; but of this his evidence is not clear, and Malloy is positive that he did not; but if it should be believed that he did, and that Malloy had forgotten, it is certain that he did not understand what was necessary to be done to make that adjustment, and it is more certain that he did not make Malloy understand what he meant by a "general average" adjustment. So, although he might have intended to inform Malloy that there must be an adjustment in general average, he did not succeed in doing it, and their minds never met on that proposition. Malloy says he never heard of "general average," and as he, Malloy, made no claim against the ship, nor Judge Wood, nor the transportation company, but was looking entirely to his insurance for indemnity, the statement of Judge Wood, if he made it to Malloy, that it was a general average loss, and there would have to be an adjustment, would not, and did not, convey to Malloy's understanding any idea of any suit, action or proceeding that he had ever heard of, for the recovery of damages. It was all Greek to him; and this is not surprising when it is remembered that there is not one lawyer in a hundred who would understand what was meant by a general average adjustment, unless he was specially engaged in admiralty or marine insurance litigation.

This being true, how could a mere layman be expected to understand the intricacies of this very abstruse branch of the law?

Appellant, after arguing itself into the belief that libelant had agreed with Gollin on the amount of its damages, set up an imaginary estoppel, and said: "The ship acted on his agreement. The ship lost the right to preserve evidence of the damages, etc."

There is not a syllable of evidence to sustain this statement. It is not shown that the ship, or any one in its behalf, did, or omitted to do, anything whatever, because of such alleged agreement. Judge Wood testified that he knew of no such agreement; that he understood the object of the survey was to reach an agreement, and, having heard nothing to the contrary, he assumed that it was made; but he did not say that he acted on that "assumption," that he did, or omitted to do, anything that he would otherwise have done if he had known that no agreement had been made. Now, Gollin was his own employee. He said that Gollin never informed him of the agreement. He said Malloy never informed him of any agreement. Both Gollin and Malloy remained in Nome within a few blocks of him as long as Judge Wood did, and if there was to be an agreement, or if a failure to agree was to be so important to the ship, as appellant would have the Court believe, Gollin certainly understood its importance, for he claims to have had 25 years' experience as an adjuster of such losses; why did not he inform Judge Wood? And since Judge Wood said he did not, why did not Judge Wood take some step to ascertain whether any agreement had been made? Judge Wood said the reason he *assumed* that an agreement had been made was, that in cases of other cargo owners failing to agree with Gollin, the matter was referred to him, and when he informed such owners that unless they agreed their goods would be held until the damage could

be ascertained, and that under this threat they agreed. But no such pressure was brought to bear upon libelant. Its goods were not withheld from it, but they were delivered before the survey was made, and no demand or effort was ever made to regain the possession of them by Judge Wood. This effectually disposes of appellant's assertion that the ship would be injured by failure to enforce the pretended agreement.

Appellant cited authority to the effect that it is competent for the parties to agree, and thus change their rights in a general average adjustment.

14 Am. & Eng. Encyc. of Law, 2d. Ed. 997.

But the very next section, on the same page, qualifies that statement as follows: "But in exempting one from liability to contribute to a general average (which the ship is claiming here, pro tanto,) it seems that the Courts are slow to enforce or import such contracts between the parties. Such exemptions can only be made *in clear and express terms.*"

Id.

Now, if the ship acted on this (alleged) agreement, there should be something in the evidence to show what the ship did, or omitted to do. What did it do, or omit? The evidence fails utterly to show. Did it withhold the goods of other owners until this pretended agreement was made? No witness says so. Judge Wood does not say so. Gollin does not so testify.

It does not appear whether the goods of other shippers were delivered before, or after libelant's goods were delivered.

It is a fair inference from the evidence that the other

goods were delivered first, and that Gollin examined them before he examined libelant's goods; at all events, they were delivered before libelant's goods were examined, and before there was any opportunity to make the pretended agreement, for it is in evidence that Gollin was so busy examining other goods before he commenced to examine libelant's goods, that he could not examine libelant's goods for several days, and that, to induce him to begin the examination it was necessary for Malloy to pay him $100.00, (which the virtuous Gollin says he took as a bribe) although he was employed by Judge Wood at a salary of $50.00 a day. Now, this was long before he examined libelant's goods, or completed that examination, and of course, long before the alleged agreement could possibly have been made. If this is true, the agreement, if any had been made, could not have had any effect or influence upon the conduct of Judge Wood or the ship in delivering or retaining other goods.

Appellant contended that the ship lost the opportunity, by this alleged agreement, to examine libelant's goods. This statement wholly fails to find support in the evidence. Gollin did not report the agreement. Malloy did not report the agreement. Judge Wood had no information that any agreement had been made, which should so seriously, as now claimed, affect the rights of the ship. Then, to all intents and purposes, matters stood as they stood before any thought of an agreement was entertained by anybody. If the ship could gain any advantage or benefit by examining libelant's goods, why was not that examination made? The goods were there. Judge Wood knew where they were, and also knew that libelant was trying to dispose of them. Judge Wood says they were constructively in his possession. If it was so

important that they be examined again by, or on behalf of the ship (for it will be remembered that Judge Wood testified that the examination which was made was for the ship), why were they not again examined?

The fact is that this is an after thought, born of the desperate plight appellant finds itself in in this case; it is a mere grasping at straws, by appellant, to show an imaginary consideration for a visionary agreement that exists only in the fertile imagination of its swift witness, Gollin, and which is now pushing its ghostly visage into this case to bolster up the very weak attempt appellant is making to avoid the payment of its just contributory share of the sacrifice of libelant's goods for the salvation of all concerned.

If the law is that such agreements must be made "in clear and express terms," the evidence wholly fails to show any such agreement. It rests solely upon the unsupported, but abundantly contradicted, statement of Gollin. If Malloy agreed to Gollin's survey, why did not Gollin have Malloy sign an acceptance, or "O. K." his report, and deliver it to Judge Wood? It would have been an easy matter, if true, to have had Malloy note at the foot of the report his agreement to its correctness. But, this was not done, and no report was made to Judge Wood concerning it.

The story of an agreement is made of whole cloth, by Gollin, and if not corruptly done, it was done to avoid censure for making such a slovenly and imperfect and careless examination, and survey.

XVI.

Appellant next asserted that the greater part of the damage to libelant's goods was done by the fire, and

that there is no basis for a general average adjustment, and it industriously culls from the testimony a few general expressions of the witnesses that the cargo was "all burned up;" was "all burned and scorched by the heat and fire," but it studiously avoids quoting or citing that part of the testimony of the witnesses that goes into the particulars. Much is made of the statement of L'Abbe, that the cargo was "all burned up," but no notice is taken of L'Abbe's statement that he only saw the cargo as it was landed, and made no examination of it. All the evidence shows that the fire was a slow smouldering fire, small in extent, confined below the tightly battened hatches, without vent, air or draft, and with no chance to burn or burst into flame. In this confined place and condition it might have smouldered for weeks without doing one-half the damage that was done by the water and steam which was poured upon it, or into the hold in an effort to put it out. Appellant said it burned a whole day before the steam was turned in, and it based this extraordinary assertion on what Peterson said on page 467 of the record, after he had been coaxed and wheedled by counsel, as follows:

Q. "You spoke yesterday in your direct examination of the fact that the first attempt to put out the fire was not successful?"

A. "Yes."

Q. "After that time—the first attempt—they opened up the hatches again and found the fire still burning?"

A. "Yes sir."

Q. "Now, how long had the fire been burning up to that time?"

A. "Well, I don't know, exactly, but I understood—

my recollection is, that the fire was discovered the second day of June, and the fourth the fire was out."

Q. "How long were they engaged in making the first attempt that you spoke of to put the fire out?"

A. "I can't say how many hours it took—I can't say."

Q. "As long as a day?"

A. "Well, I guess it did—pretty near—seemed to me about that."

In this appellant wholly ignores what the same witness said on page 437 of the record, where he said:

Q. "How long did the fire burn?"

A. "Well, that I couldn't say, exactly, because my recollection is it was the second day of June that they found it, and that they didn't get it out at first—well, *they had steam on it*, then they opened up the hatches and thought it was out, but found it still burning, and battened down the hatches again, and about the fourth, I think, the fire was extinguished."

This shows that "*they had steam on it,*" as soon as it was discovered, on the first day. This also accords with Malloy's testimony where he says that they made three separate efforts to extinguish the fire with water and steam, p. 565 of the record. On that page Malloy says: they put water in the hold and steam at 200 pounds pressure, on June 2d, the day the fire was discovered, kept this up for six to eight hours, then opened the hatches, put them back and forced steam in for probably six hours more, that was on June 3d, and on June 4th forced steam in again for five or six hours, and also put in two or three feet of salt water. (Record p. 565.)

Now, without the aid of this positive testimony, that

efforts with water and steam were made, as soon as the fire was discovered, to put it out, it is preposterous to assert that the captain would allow the fire to burn, after discovery, for a whole day without trying to put it out. This would be to accuse the captain of a serious and criminal neglect of duty.

It is worthy of remark, in this connection, that it is very strange that the appellant did not call the captain of the ship, its own employee, who knew more of the origin and extent of the fire and the damage done by it than any one else, and what efforts were made to put it out, and when they were made. It is also remarkable that it called none of the other officers or crew of the vessel, who helped to extinguish it.

And more remarkable still, that appellant did not offer in evidence the Marine Protest made by the captain, giving the origin and extent of the fire. It was the duty of the captain to make to the owner a protest, and the presumption is that he did his duty in that regard.

The presumption arising from the suppression of evidence, or the failure to produce it, by calling those witnesses and offering that protest, should be indulged against the appellant in this case, in this particular, that if it had been produced, it would have been against appellant.

Kirby vs. Talmadge, 160 U. S. 379,

Jonathan Mills Co. vs. Whitehurst, 72 Fed. Rep. 502,

Clifton vs. U. S., 4 How. 242,

U. P. Ry. Co. vs. Botsford, 141 U. S. 255,

Runkle vs. Burnham, 153 U. S. 226,

In re Hussman, 12 Fed. Cases, 1076,

U. S. vs. Chaffee, 25 Fed. Cases, 388.

The evidence shows that there was but little fire. T. J. Considine says, there was very little fire, (Rec. p. 434). Judge Wood says, "A few of the packages were actually burned by the fire, *but not many.*" (Rec. p. 769.) Malloy says, "the fire was not very extensive." (Rec. p. 569.)

It is also clear from the testimony, and from all the circumstances, that when the witnesses say the damage was done by "heat," they mean the heat caused by the steam, and not by the fire, for we have seen that there was very little fire, and an abundance of steam poured into the hold for from 14 to 18 hours or longer.

XVII.

Libelant contends that the articles "scorched" or "blistered" if they were also injured by water or steam, are not to be classed as particular average, for the York-Antwerp Rule, 111 only excludes from general average such articles of the cargo "as have been on fire," and this has been held to mean "touched" by the fire.

14 Am. & Eng. Encyc. of Law, 2d Ed. 973, and note. And "touched" is defined by the Century Dictionary, (p. 6400,) "to be in contact with," "to be in physical contact with," etc.

Now, if nothing is excluded from general average except such packages as "have been on fire—touched by the fire—been in physical contact with the fire," then packages that were merely "scorched" or "blistered," would not be considered as having "been on fire," for the scorching or blistering might be done by radiated heat, without the fire having touched or been in physical

contact with the packages, especially is this true, if the greater damage was done by water and steam, as is true in this case. The reason given by the books for excluding packages which "have been on fire," that they would have been consumed by the fire if water and steam had not been poured on them, does not rationally apply to packages scorched or blistered by radiated heat. But however this may be, the articles of the cargo that had "been on fire," or "scorched" or "blistered," constitute a very small part of the cargo, and if they should all be charged to particular average, and excluded from this adjustment the great bulk of the cargo will have to be contributed for in general average, because of the damage done by water and steam and steam heat. Every article in any manner affected by the fire is set forth, with reference to the pages of the testimony in a list which is made a part of this brief, and the testimony there referred to will enable the Court to readily determine what articles of the cargo should be excluded from this adjustment, as falling under the designation of particular average, and to segregate them from the great bulk of the cargo subject to general average.

XVIII.

Libelant submits that the case of the *Reliance Ins. Co. vs. N. Y. Mail S. S. Co.,* 70 Fed. Rep. 262, and 77 Id. 317, relied upon by appellant in the District Court, is not an authority for appellant, for in that case there was no pretense that the tobacco had been injured by the steam; but the contention was that the steam had forced the *smoke* through the tobacco and thus injured it.

XIX.

Appellant next asserted that there were no market prices at Nome at the time the Santa Ana arrived there in June and July, 1900, and insisted therefore, that the cost prices of the cargo should be taken as their value. It quoted the statement of the witness Pope, that it was "his Christianlike policy to charge all the traffic would bear" as evidence that there were not market prices at Nome at that time. Now, we insist that this remark does not prove what is claimed for it, for it is common knowledge, within every one's experience and observation, that every merchant, everwhere "charges all the traffic will bear." That is the only way in which prices are made, or ascertained. If the merchant puts his goods on the market, or on his shelves or counters, or in his store, and offers them to the public at certain prices, and finds no buyers, he knows that he has "charged more than the traffic will bear," but if he finds buyers at such prices, he knows the traffic will bear such prices, and thus his market price is made, and established. It is, of course, unnecessary to suggest to this Court that what the witness meant was that it was his policy to sell his goods for the highest price he could safely charge and do business, or for such prices as the demand in that market would reasonably justify and yield a profit. Appellant also cited the deposition of La Boyteaux to prove that there were not market prices at Nome; but Mr. La Boyteaux does not so testify, he says, in effect, that he could get no satisfactory evidence of the Nome prices, and he therefore arbitrarily added 15 per cent to the cost price. It is true Mr. La Boyteaux did not have evidence of the market prices at Nome, and to that extent he was embarrassed in making his adjustment; but this Court has

evidence of the market prices at Nome at that time, in abundance, and of the best and most reliable character in the testimony of Mr. Pope, the manager of the Alaska Commercial Company, and of Mr. Valentine, then the manager of the Nome Trading Co., now County Surveyor of King County, Washington; those companies being two of the largest merchants in Nome at that time; of Mr. Dawson, the largest liquor dealer there, and of a number of other prominent and reliable merchants who were actively in business in Nome at the time covered by this inquiry, and all of whom give the market prices there. Mr. Campion was so careful and so anxious to be right, that he confined his testimony to actual sales made by him there at that time and constantly referred to his book of daily sales for the data.

Appellant said there can be no market price when the witnesses give the prices at from 80 to 500 per cent. above Seattle, or cost prices. This is an unfair statement of the testimony. No witness stated that any article was worth "from 80 to 500 per cent above cost price." The truth is, that nearly all of the witnesses testified that some articles were worth 80 per cent. and other articles 500 per cent. above Seattle prices, for instance, Mr. Urquhart says whisky, cigars, etc., were worth from 80 to 100 per cent over cost outside. (Rec. p. 224.) Mr. Nestor says lumber was worth $125.00 per thousand, (Rec. p. 250.) Other witnesses say lumber cost in Seattle $22.50 to $25.00 per thousand. If it was worth $125.00 per thousand in Nome, that would be 500 per cent above Seattle prices. Mr. Campion says lumber was worth from $150.00 to $200.00 per thousand, (Rec. p. 548.) Whiskies, which the exhibits show cost $2.35 to $2.50 per gallon were worth $5.00 and $6.00 per gallon, (Rec. p.

550), and Old Crow whisky, (Exhibit 53) was worth $7.50 per gallon, (Rec. p. 551), and beer which cost $9.15 per barrel in Seattle, was worth from $25.00 to $30.00, (Rec. p. 551) per barrel there at that time, being 250 to 300 per cent above Seattle prices. We cite these as a fair sample of all the testimony to show how reckless appellant was in its assertion.

XX.

Appellant in the face of the positive testimony, says that a considerable portion of libelant's cargo "was bought from themselves, under the name of the Standard Club, and what the cost was does not appear." Now, the libelant is a corporation, and the Standard Club was a partnership (Rec. p. 676-7) and the goods obtained from that Club were bought and paid for (Rec. p. 677), and the items and prices paid for these articles are shown in the exhibits in evidence, and are identified by the witness Malloy, and his testimony is no where contradicted. Appellant evidently wants the Court to hold that because Malloy was a member of the corporation and also a member of the partnership, that fact impeaches him and renders him unworthy of belief. If appellant did not think Malloy's testimony worthy of belief, why did it not offer some evidence to contradict it, or why did it not impeach him?

XXI.

Appellant said the item of $6000.00, expenses incurred in selling the damaged cargo ought not to be deducted from the gross amount of sales, for, it says, it (libelant) would have been put to the expense of the sale in any event. In reply to this we say that if the cargo had arrived sound, and libelant had put it on the market in

the usual course of business, it would, of course, have had to pay the expenses of such sales, but it would also have had the benefit of the profits arising from the sale of sound merchantable, salable goods, in a market where the demand for such goods was great and the profits enormous. But that has nothing to do with this case. This is a case where goods are damaged by an act of the master of the ship sacrificing libelant's goods to save an entire valuable adventure, including ship, passengers, crew and cargo from a common peril, and such goods when landed are so damaged as not to be marketable or salable in the ordinary way, in the usual course of business, and extraordinary means and efforts are required to be taken and adopted to realize anything from them and thus reduce the loss, and when expenses are incurred in so disposing of such goods such expenses are the proper subject of general average. If the goods had been sold at auction, after being landed, the expenses of the sales would be deducted from the gross amount received to ascertain their net value, in their damaged condition, for the purpose of contribution.

4 Joyce on Ins., Sec. 3452.

Muir vs. U. S. Ins. Co., 1 Caines, (N. Y.), 54.

The reason for allowing such expenses is stronger, it seems to us, in a case like this, where the owner of the goods has made an earnest and honest effort to realize more on the goods by selling them at private sale, peddling them about, hunting up buyers, and actually selling them for more than they would have brought at auction, than in the case of an auction sale.

XXII.

We have not contended and do not contend that anything that was "on fire," can be taken into consideration in estimating the losses which should be contributed for in general average. But we do insist that the articles that were "on fire," or "touched by fire," in amount and value, constitute much less than ten per cent of the damaged cargo of libelant, and if all the articles which were "on fire," "charred," "singed," "scorched," and or "blistered" are deducted, the allowance in favor of libelant would not be greatly reduced below the figures stated in this brief.

By the terms of the contract of affreightment—the bill of lading—the adjustment in general average is to be made in accordance with the York-Antwerp Rules of 1890, and those rules require everything to be brought into the adjustment, except articles that "have been on fire," and that these words do not include articles that were not "touched" by the fire—that did not come into "physical contact" with the fire, and that, therefore, "scorched" or "blistered" articles should be included in the adjustment, as having been damaged by a general average act or sacrifice, we think we have clearly shown.

XXIII.

List of articles referred to in this brief as affected by fire:

All the damage done by the fire is shown by the following uncontradicted testimony:

JUDGE WOOD, witness for claimant says:

"Some of the packages were very much discolored,

and, of course, a few were actually burned by the fire, *but not many.* (Rec. p. 769).

A. G. LANE, witness for libelant says:

"The damage to the piano was caused by the steam pressure and heat." (Rec. p. 332).

The steam penetrated everything, (Rec. p. 332).

One end of the bar fixtures was charred and had to be scraped off. (Id. p. 333).

There was very little of the furniture burned, it was water soaked and steam soaked, (Id. p. 335).

The ale barrels were scorched (Id. p. 337).

The scenery was injured by steam, and some of it was scorched, (Id. 346).

The linoleum had not been touched by fire, (Id. p. 365).

One end of the bar was scorched, but the furniture was not burned at all, (Id. p. 365).

The barrels were not scorched by fire, more than one or two, (Id. p. 368).

The piano was not scorched, the outside box was scorched a little, (Id. 368).

There was one roll of scenery that had one end scorched, (Id. p. 368).

The case goods were not scorched, two or three of them, I think, were smoked, (Id. p. 369).

There was one barrel of crockery ware that was considerably scorched, (Id. p. 370).

The ends of some of the champagne cases were smoked, (Id. p. 370).

Think some of the barrels of liquor, two or three, were scorched a little on the outside, (Rec. p. 371).

But none of the case goods, except some that were smoked, (Id. p. 371).

Probably one-fourth of 108 doors were scorched on the ends, that is, the end of the bundle, (Id. p. 371).

Think two of the big crap tables that were cased up, the outside casing, was scorched on two of them, (Id. p. 373).

There were some of the ends of the finishing lumber that were scorched some, but they were not badly scorched, (Id. p. 374).

Not over three or four bundles were burned any, (Id. p. 374).

There was a crate of kitchen utensils that was badly scorched, (Id. p. 375).

There were a few of the barrels scorched some, don't know whether whisky or porter, (Id. p. 375).

There was a full kitchen outfit and canned groceries damaged by fire, (Id. p. 701-855).

And a couple of barrels of stuff burned and thrown overboard, (Id. p. 855).

GEO. A. L'ABBE, witness for libelant, says:

Saw some cases of wine brought out of the hold, that were charred and burned, (Id. p. 402).

The wines and bar fixtures were all burned up, (Id. p. 403).

I looked at our stuff and it was not good, it was all —the most of it I looked at was burned up, (Id. p. 403).

Now, it is apparent that this is a mere general statement of the witness, made to express forcibly, his idea that the goods were damaged, but not necessarily, "burned up," because that would not be true, as shown by his own, and the testimony of all the other witnesses. In that connection, he was asked:

Question: "You did not examine it specially to ascertain the amount of the damage?" And he answered: "No sir." (Id. p. 403).

The fire lasted three or four days, (Id. p. 404-5).

After the fire was put out, they brought some of the cases of wine on deck, the cases were charred, (Id. p. 405).

Some of the cases (of wine) that were brought up, were burned pretty near through, (Id. 406).

I know it burned the lumber and furniture some, (Id. p. 406).

The fire had gotten into the groceries, (Id. p. 407). But this statement is qualified by the next answer in which he says the steam had gotten into the canned goods, (Id. p. 407).

T. J. CONSIDINE, witness for libelant says:

The portion of the cargo brought up after the fire, some of the packages were scorched and burned, (Id. p. 433).

Some of the damage was from smoke, *a little fire,* and the most from steam and heat, (Id. p. 434).

F. G. PETERSON, witness for libelant, says:

There were one or two mattresses burned a little, (Id. p. 465).

The bar fixtures were injured a little by the fire, (Id. p. 466).

There were a few of the champagne cases burned, (Id. p. 468).

One barrel of whisky was scorched, (Id. p. 473).

There were a few cases of champagne scorched a little, (Id. p. 482).

There was one barrel of beer scorched, (Id. p. 484).

The bar fixtures were scorched a little, (Id. p. 487).

There was one bundle of carpet scorched, (Id. p. 493).

The tents were smoked, (Id. p. 494).

Two mattresses were scorched some, (Id. p. 496).

W. A. MALLOY, witness for libelant, says :

Some of the champagne cases were thrown overboard, and when the cargo was landed there were 13 or 14 cases short, (Id. p. 500).

There were some of the cases burned, but very few, (Id. p. 500).

And some of the bottles broken by the fire, (Id. p. 500).

One case was burned through, and six or seven or eight cases scorched, (Id. p. 500-1).

H. C. GORDON, witness for libelant, says:

Many packages showed marks of fire, (Id. p. 502).

The bar fixtures were scorched, (Id. p. 504).

The corks and labels were singed, (Id. p. 511).

The rubber stamps were near the heat, (Id. p. 413).

A number of window frames were scorched, (Id. p. 517).

Three or four doors were scorched, (Id. p. 517).

The skeleton safes were blistered, (Id. p. 519).

The sewer pipe must have been in the neighborhood of extreme heat, (Id. p. 522).

The cigar cases were charred, (Id. p. 525).

The bar fixtures had been damaged by heat, and one corner of the piano box was scorched, (Id. p. 529).

Don't think the flames injured the interior of the piano, (Id. p. 529). It did not burn through the casing. (Id. 530). The bax was charred on one end, or side, (Id. p. 530).

The corks and labels were in a sack, and had been very near the the fire, (Id. p. 534).

The smoke discolored the wardrobes, (Id. p. 535).

W. A. MALLOY, Con'd:

There were probably ten cases thrown overboard, (Id. p. 567).

The fire was not very extensive, (Id. p. 569).

The roll-top desk was blistered, (Id. p. 585).

One or two kegs of nails were burned, (Id. p. 602).

The goods in exhibit 38 were burned, (Id. 658).

One or two blankets were scorched, (Id. p. 659).

There were two or three barrels charred—two in particular, (Id. p. 662).

Some of the legs of the tables were blistered, (Id. p. 665).

They were in crates, and the crates showed that they had been in connection with the fire, (Id. p. 666).

The big suit wheel had the glass cracked, seemed to be close to a lot of heat, (Id. p. 667).

One keg of nails was scorched, (Id. p. 668).

Exhibits 83 and 84 were supposed to be where there was considerable fire, but they were not scorched or burned, (Id. p. 670).

Exhibit 84 was blistered, not scorched, (Id. p. 671).

The dice were melted, they were where there was a lot of heat, (Id. p. 672). I didn't notice any sign of fire on the package they were in, (Id. p. 672).

A. G. LANE, Con'd:

Exhibit 14 had been right in the fire, the crate was charred, (Id. p. 680).

The corners of some of the blankets were burned, (Id. p. 683).

The groceries were close to the fire, (Id. p. 686).

The big tent had 100 holes burned in it, (Id. p. 686).

F. G. PETERSON, Con'd:

One pair of blankets burned, (Id. p. 705).

The envelopes were spoiled by fire, (Id. p. 713).

Some of the brushes were burned, (Id. p. 717).

The aprons, towels, etc., were smoked, (Id. p. 719).

H. C. GORDON, Con'd:

A small part of the finishing lumber was charred by fire, (Id. p. 735).

Some of the crates of doors were burned through, and the corners of the doors burned, (Id. p. 743-4).

One box of cigars had been scorched, (Id. p. 746).

This list embraces everything that was even remotely touched or in any manner injured by the fire, and by smoke, or the heat of the fire, and, by comparing it with the exhibits it will be seen at once that it comprises much less than one-tenth of the cargo belonging to libelant.

As Judge Wood says: "Oh yes, some of the packages were very much discolered, and, of course, a few were actually burned, by the fire, *but not many.*" (Rec. p. 769).

And Malloy says: "The fire was not very extensive." (Rec. p. 569).

And Considine says: "Some of the damage was from smoke, a *little fire*, and the most from steam and heat." (Rec. p. 434).

There is no conflict in the evidence on this point, nor is there any evidence to the contrary, nor anything to show that any other portion of the cargo except that stated in this list was in any manner damaged by the fire, or the heat from the fire.

When the witnesses speak of damage by "heat," it is clear that they mean the heat caused by the steam put in the hold to extinguish the fire.

This list shows all the articles of the cargo subject to "particular average," of which the appellant attempted to make so much in the District Court. And when it is deducted from the total cargo, even if the Court should think that articles "scorched," or "blistered," fall within the provisions of Rule 111, "Such separate packages of cargo, as have been on 'fire,'" it will fall far short of embracing one-tenth of libelant's cargo.

Wherefore libelant respectfully asks this Court to carefully consider and weigh all the evidence in this case and to render such decree, or direct the District Court to do so, as the evidence shows the libelant to be entitled to.

Respectfully submitted,

WM. H. BRINKER,

Proctor for Libelant and Appellee.